Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

Vol. 13 DECEMBER 5, 1979 No. 49

This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 79-297)

Reimbursable Services—Excess Cost of Preclearance Operations

Notice is hereby given that pursuant to section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess cost for the new preclearance installation is estimated to be as set forth below, effective October 28, 1979.

Installation	*Biweekly excess cost*
Edmonton, Canada	$4,315.00

MITCHELL A. LAVINE
(For JACK T. LACY, *Comptroller.*)

[Published in the Federal Register, Nov. 27, 1979 (44 FR 67747)]

(T.D. 79-298)

White or Irish Potatoes, Other Than Certified Seed—Tariff-Rate Quota

Tariff-rate quota for the quota year beginning September 15, 1979, for white or Irish potatoes, other than certified seed.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for white or Irish potatoes, other than certified seed, for the 12-month period beginning September 15, 1979.

SUMMARY: The tariff-rate quota for white or Irish potatoes, other than certified seed, pursuant to item 137.25, Tariff Schedules of the United States, for the 12-month period beginning September 15, 1979, is 45 million pounds.

EFFECTIVE DATES: The 1979 tariff-rate quota is applicable to white or Irish potatoes described in item 137.25, TSUS, entered, or withdrawn from warehouse, for consumption during the 12-month period beginning September 15, 1979.

FOR FURTHER INFORMATION CONTACT: Helen C. Rohrbaugh, Head, Quota Section, Duty Assessment Division, Office of Commerical Operations, U.S. Customs Service, Washington, D.C. 20229; 202-566-8592.

SUPPLEMENTARY INFORMATION: Each year the tariff-rate quota for potatoes described in item 137.25, Tariff Schedules of the United States (TSUS), is based on the estimate by the Department of Agriculture of potatoes produced during the calendar year.

The estimate of the production of white or Irish potatoes, including seed potatoes, in the United States for the calendar year 1979, made by the U.S. Department of Agriculture as of September 1, 1979, was in excess of 21 billion pounds.

In accordance with headnote 2, part 8A, of schedule 1, Tariff Schedules of the United States, the quota quantity is not increased because the estimated production is greater than 21 billion pounds.

R. E. CHASEN,
Commissioner of Customs.

[Published in the Federal Register, Nov. 27, 1979 (44 FR 67747)]

U.S. Customs Service

General Notice

(19 CFR Parts 4, 144, 151, 159)

Extension of Time for Comments Concerning Proposed Amendments to The Customs Regulations Relating to Public Gaugers of Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of extension of time for comments.

SUMMARY: This document extends the period of time permitted for the submission of comments in response to the recent proposal to amend the Customs Regulations relating to public gaugers of imported petroleum and petroleum products. This extension will permit the preparation and submission of more detailed comments by interested members of the public.

DATE: Comments must be received on or before December 14, 1979.

ADDRESS: Written comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations and Research Division, U.S. Customs Service, 1301 Constitution Avenue NW., room 2335, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Alice M. Rigdon, Cargo Processing Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202–566–5354.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 7, 1979, the Customs Service published in the Federal Register (44 F.R. 64434), notice of a proposal to amend parts 4, 144, 151, and 159, Customs Regulations (19 CFR parts 4, 144, 151, 159), to incorporate recommendations of a Customs Petroleum Imports Task Force for establishing guidelines and procedures applicable to the use of public gaugers in monitoring imports of petroleum and petroleum products. As fully explained in that notice, the purpose of the proposed amendments is to insure proper control of imported petroleum and petroleum products and uniform, complete, and reliable statistics relating to the importation of these products.

COMMENTS

Customs has received a request from an industry trade association to extend the period of time for the submission of comments in order to prepare a more detailed response. Therefore, the period of time for submission of comments is extended to December 14, 1979.

Dated: November 16, 1979.

SALVATORE E. CARAMAGNO,
Acting Director, Office of Regulations and Rulings.

[Published in the Federal Register, Nov. 21, 1979 (44 FR 66835)]

ERRATUM

In CUSTOMS BULLETIN, volume 13, No. 42, dated October 15, 1979, in T.D. 79-260-Q, on page 26, correct second line to read:

Articles: Numerically controlled bar chuckers and turning centers and correct third line to read:

Merchandise: Imported and/or drawback bar chuckers and turning centers

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1235)

PHARMACIA LABORATORIES, INC. *v.* THE UNITED STATES

No. 79-23

1. CLASSIFICATION—RADIOIMMUNOASSAY DIAGNOSTIC TEST KITS.

Customs Court decision affirming classification of radioimmunoassay diagnostic test kit under item 799.00, Tariff Schedules of the United States (TSUS), affirmed.

2. ID.—SEVERAL COMPONENTS.

Article containing several components is not classifiable under TSUS provisions applicable to only one particular component if the other components are necessary to the function of the article.

3. DEFINITION—COMPOUND.

Kit, consisting of several vials of different chemicals, does not meet the definition of "compound" found in headnote 2(a) of schedule 4 of the TSUS.

U.S. Court of Customs and Patent Appeals, November 15, 1979

Appeal from U.S. Customs Court, C.A.D. 1235

[Affirmed.]

Murray Sklaroff, attorney of record for Pharmacia Laboratories, Inc., appellant.

Alice Daniel, Acting Assistant Attorney General, *David M. Cohen*, Director Customs Litigation Branch, *Joseph I. Lieberman*, Field Office for Customs Litigation, *Susan C. Cassell*, for appellee

[Oral argument on Nov. 5, 1979 by Murray Sklaroff for appellant and by Susan C. Cassell for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, and MILLER, *Associate Judges*, and NEWMAN,[1] *Judge*.

MARKEY, Chief Judge.

[1] Pharmacia appeals from a judgment of the U.S. Customs Court, 82 Cust. Ct. ——, C.D. 4798, 470 F. Supp. 853 (1979), affirming the Government's classification of certain radioimmunoassay diagnostic test kits under item 799.00,[2] TSUS, rather than item 494.50,[3] TSUS. We affirm.

BACKGROUND

The kits, used to detect certain chemicals in blood serum, consist of four or five separate vials, one containing a radioactive substance and the others containing ingredients needed to conduct the test. Pharmacia protested classification under 799.00, but conceded that if classification as usefully radioactive chemical compounds under item 494.50 was not proper, the kits would be properly classified under item 799.00.

CUSTOMS COURT

The parties agreed that the kits were entireties for purposes of customs classification. Judge James L. Watson, held classification proper under TSUS item 799.00 of any of three grounds: (1) The kits are not chemical compounds within the meaning of "compound" in headnote 2 of schedule 4[4] and thus do not come within the plain meaning of the claimed provision; (2) each kit consists of a number of vials containing separate and distinct compounds, and is thus too

[1] The Honorable Bernard Newman, Judge, U.S. Customs Court, sitting by designation.

[2] Schedule 7, part 14, Tariff Schedules of the United States:

Any article, not provided for elsewhere in these schedules:
Which is similar in the use to which it may be applied to any article or articles enumerated in any of the foregoing provisions of these schedules as chargeable with duty:

* * * * * * *

799.00 Other.

[3] Schedule 4, part 13, subpart B:

494.50 Chemical elements, isotopes, and compounds, all the foregoing (except natural thorium and uranium in a metallic state, and except compounds of natural thorium and uranium), whether or not described elsewhere in this schedule, which are usefully radioactive.

[4] Schedule 4 headnotes:

* * * * * * *

2. (a) The term "compounds," as used in this schedule, means substances occurring naturally or produced artificially by the reaction of two or more ingredients, each compound—
(i) consisting of two or more elements,
(ii) having its own characteristic properties different from those of its elements and from those of other compounds, and
(iii) always consisting of the same elements united in the same proportions by weight with the same internal arrangement.
The presence of impurities which occur naturally or as an incident to production does not of itself effect the classification of a product as a compound.
(b) The term "compounds," as used in this schedule, includes a solution of a single compound in water, and, in determining the amount of duty on any such compound subject to duty in this schedule at a specific rate, an allowance in weight or volume, as the case may be, shall be made for the water in excess of any water of crystallization which may have been in the compound.
3. (a) The term "mixtures," as used in this schedule, means substances consisting of two or more ingredients (i.e., elements or compounds), whether occurring as such in nature, or whether artificially produced (i.e., brought about by mechanical, physical, or chemical means), which do not bear a fixed ratio to one another and which, however thoroughly commingled, retain their individual chemical properties and are not chemically united. The fact that the ingredients of a product are incapable of separation or have been commingled in definite proportions does not in itself affect the classification of such product as a mixture.
(b) The term "mixtures", as used in this schedule, includes solutions, except solutions defined as compounds in headnote 2(b) of this schedule.

diverse to be properly described by the claimed provision; and (3) the nonradioactive compounds being as important to the results of the test as the radioactive compound, the latter should not determine classification of the kit.

ISSUE

The sole question presented is whether the imported kits are classifiable as "usefully radioactive compounds." [5]

OPINION

Pharmacia argues that because the kits in issue are bought, sold, stored, used, and discharged as though they were radioactive compounds, they should be classified as such.

The United States argues that because (1) the kits have several components, only one being radioactive, (2) the function of the kits requires nonradioactive components, and (3) the kit does not meet the definition of "compound" in the TSUS, the kits are not classifiable under item 494.50.

Arguments (1) and (2) of the United States are but different statements of its position that the imported kits are "other than" or "more than" usefully radioactive compounds.

[2] "[I]t is well settled that articles which in fact constitute more than other articles are not classifiable under provisions applicable to those other articles." *Pollard Bearings Corp.* v. *United States*, 62 CCPA 61, 64, C.A.D. 1146, 511 F. 2d 568, 571 (1975) (quoting *United States* v. *Flex Track Equipment Ltd.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972)).

Pharmacia's expert witness testified that the kit contains two components necessary to conduct the test, the radioactive element and the antibody. He admitted that the antibody determines the character of the test, and that the test cannot measure anything without the antibody.

Judge Watson found from the testimony and exhibits that two components, the antibody and the standard, were at least as important to the test as the radioactive element. This court will not reverse on questions of fact unless the findings are clearly contrary to the weight of the evidence. *Pollard Bearings*, *supra*, *United States* v. *F. W. Myers & Co.*, 45 CCPA 48, 52, C.A.D. 671 (1958). Far from any question of contrariness to the weight of the evidence here, Judge Watson's finding that other components are as important as the radioactive component is amply supported by the record. In view of the importance of its other components, it is apparent that the kit is more than a radioactive compound.

[5] The authorities cited on appeal by Pharmacia were either fully distinguished by Judge Watson or are directed to a question not at issue on appeal (criteria for determining classification of related items as entireties).

[3] Argument (3) of the United States is also correct. The imported kit, consisting of a number of vials, does not meet the definition of "compound" in schedule 4, headnote 2(a). It is not a "substance occurring naturally or produced artificially by the reaction of two or more ingredients."

Hence, classification of the imported kits under 494.50 would be improper whether they be viewed as more than "usefully radioactive compounds" or as failing to meet the definition of "compound."

Treatment of the kit as a radioactive compound is of no moment here. Rules and regulations governing storage, handling, and use of radioactive materials were developed to protect the public safety, not as guidance to customs classification.

The judgment of the Customs Court is *affirmed.*

(C.A.D. 1236)

THE UNITED STATES *v.* H. ROSENTHAL CO.

No. 79–7

1. CLASSIFICATION—PARKAS.

Customs Court decision sustaining protest of classification of parkas under item 380.84 of the Tariff Schedules of the United States and holding proper classification to be under item 376.56, affirmed.

2. DEFINITION—COATED.

Definition of "coated" given in schedule 3, part 4, subpart C, headnote 2(a) does not require the coating to be visible *per se.*

3. ID.—Fabric.

Fabric is coated if the fabric surface is "visibly" and "significantly" affected other than by a change in color.

4. STATUTORY LANGUAGE.

If statutory language is clear and unambigouus, there is no reason to reject its meaning and search for another.

5. ID.

That a test required by the statute may be difficult to administer does not justify adoption of a test contrary to the clear meaning of the statute.

U.S. Court of Customs and Patent Appeals, November 15, 1979

Appeal from U.S. Customs Court, C.A.D. 1236

[Affirmed.]

Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Director,

Customs Litigation Branch, *Joseph I. Liebman*, Field Office for Customs Litigation, *Sidney H. Kuflik*, for appellant.

Howard G. Feldman, attorney of record for H. Rosenthal Co., appellee.

[Oral argument on Nov. 5, 1979 by Sidney H. Kuflik for appellant and by Howard G. Feldman for appellee.]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, and MILLER, *Associate Judges*, and NEWMAN,[1] *Judge*.

MARKEY, Chief Judge.

[1] The Government appeals from the judgment of the U.S. Customs Court, 81 Cust. Ct. 77, C.D. 4769 (1978), sustaining H. Rosenthal Co.'s (Rosenthal's) classification protest relating to imported men's and boy's parkas. Judge Morgan Ford held that proper classification was under item 376.56,[2] TSUS, as "coated rainwear." We affirm.

BACKGROUND

The parkas, imported from South Korea in August 1973, were made from nylon fabric coated with a waterproofing acrylic polymer. Invisible to the unaided eye, the coating is visible under a microscope at 35x magnification.

The Customs Service classified the parkas under TSUS item 380.84[3] as "other men's or boy's wearing apparel." Rosenthal advanced a claim of proper classification under TSUS item 376.56 as "coated rainwear." Rosenthal also argued that the government should be equitably estopped from classifying the parkas under TSUS item 380.84 because of actions taken and advice given by Customs Service employees.

Judge Ford held that the definition of coated fabric in headnote 2(a) of TSUS schedule 3, part 4, Subpart C[4] requires the coating to visibly

[1] The Honorable Bernard Newman, Judge, U.S. Customs Court, sitting by designation.

[2] Schedule 3, part 6, subpart D:

Garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or plastics, which (after applying headnote 5 of schedule 3) are regarded as textile materials:

* * * * * * *

376.56	Other	16.5% ad valorem

[3] Schedule 3, part 6, subpart F:

Other men's or boy's wearing apparel, not ornamented:

* * * * * * *

Of man-made fibers:

* * * * * * *

380.84	Not Knit	25¢ per lb. + 27.5% ad valorem

[4] Schedule 3, part 4, subpart C:

Headnote 2. For the purpose of the tariff schedules—

(a) the term "coated or filled", as used with reference to textile fabrics and other textile articles, means that any such fabric or other article has been coated or filled (whether or not impregnated) with gums, starches, pastes, clays, plastics materials, rubber, flock, or other substances, so as to visibly and significantly affect the surface or surfaces thereof otherwise than by change in color, whether or not the color has been changed thereby;

* * * * * * *

and significantly affect the surface of the fabric, and that visibility of the coating itself to the unaided eye is irrelevant for purposes of classification under headnote 2(a). The government conceded that the acrylic polymer treatment had a "substantial" affect on the fabric. Judge Ford found the fabric surface to have been visibly affected by the coating and held that the test of headnote 2(a) was thus satisfied.

ISSUES

The dispositive issue is whether headnote 2(a) requires that a fabric coating be per se visible to the unaided eye before a fabric may be classified as coated.[5]

OPINION

The government argues that the appealed judgment: (1) Conflicts with precedent; (2) conflicts with legislative history; and (3) fixes an administratively inconvenient definition for coated fabric.

(1) PRECEDENT

The government cites *United States* v. *Pinney, Cases & Lakey Co.*, 105 F. 934 (2d Cir. 1900), and *Kaplan Products & Textiles, Inc.* v. *United States*, 70 Cust. Ct. 166, C.D. 4425 (1973), as authority for its assertion that the coating itself must be visible to meet the requirements of headnote 2(a).

In *Pinney*, the fabric was cotton cloth, classified by the government as "filled." The court held that fabric was filled if the interstices between the fabric threads were substantially closed by the introduction of various kinds of inorganic matter. The test was "inspection or examination by unaided eyesight." Id. at 937. Nothing in *Pinney* concerned use of a visual inspection test to determine whether a fabric was "coated." The statutory language, "coated or filled," being in the disjunctive, no requirement exists to employ the same test for "coated" as for "filled." *Pinney* is simply irrelevant here.

The fabric in *Kaplan* was cotton suede, treated to render it water-repellant. The question was whether the treatment produced a coated fabric under headnote 2(a). Finding an untreated fabric sample visually indistinguishable from a treated sample, the court held that to qualify under headnote 2(a) "the fabric must be coated with a substance which will '*visibly*' affect the surface of the cloth." *Kaplan Products & Textiles, Inc.* v. *United States*, *supra* at 169 (italic the court's). **[2]** We agree with Judge Ford's view that the test in *Kaplan* was not whether the *coating* is visible, **[3]** but whether the *fabric surface* is visibly affected.

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[5] Judge Ford's finding that the "visibly affect the surface of the fabric" test was literally satisfied is not contested on appeal.

In view of our holding, we do not reach Rosenthal's equitable estoppel contention.

(2) LEGISLATIVE HISTORY

Legislative intent is determined, in the first instance, by reference to the statutory language, presumably used in its normal sense. *John S. James a/c The Consolidated Packaging Corp.* v. *United States*, 48 CCPA 75, C.A.D. 768 (1961); *United States* v. *British Cars & Parts, Inc.*, 47 CCPA 114, C.A.D. 741 (1960). [4] If the statutory language is clear and unambiguous, there is no reason to reject its meaning and search for another. *Akawo, Morimura & Co.* v. *United States*, 6 Ct. Cust. Appls. 379, 381, T.D. 35921 (1915).

Headnote 2(a) defines "coated" as treatment of the fabric which "visibly and significantly affect[s] the surface or surfaces thereof otherwise than by change in color." That definition is sufficiently clear and unambiguous to obviate resort to legislative history in a search for congressional intent. The government points to no ambiguity in the statutory language *per se*, but asserts that legislative history shows a congressional intent that the headnote have a meaning different from that of its plain language. As stated in *United States* v. *Corning Glass Works*, 66 CCPA ——, C.A.D. 1216, 586 F. 2d 822, 825 (1978), "[C]reation of an ambiguity in an otherwise clear and unambiguous statute, by reference to legislative history, is improper."

The government's reliance on a portion of the *Explanatory Notes To The Brussels Nomenclature* [6] is misplaced. The portion relied on, having been drafted after enactment of the Tariff Schedules was not part of the legislative history of the headnote. Further, the headnote language differs from that of the *Brussels Nomenclature*. *See F. L. Smith & Co.* v. *United States*, 56 CCPA 77, C.A.D. 958, 409 F.2d 1369 (1969).

(3) ADMINISTRATIVE INCONVENIENCE

The government argues that the result reached here would create an administratively unworkable criterion for identifying a coated fabric, asserting that both coated and uncoated fabric samples would be required to enable the Customs Service to determine whether the fabric is coated. If that assertion be correct, it remains unavailing. [5] That a test required by a headnote may be more difficult to administer cannot justify a disregard of the clear meaning of the head-

[6] The portion relied on by the government reads:

59.08—TEXTILE FABRICS IMPREGNATED, COATED, COVERED OR LAMINATED WITH PREPARATIONS OF CELLULOSE DERIVATIVES OR OF OTHER ARTIFICIAL PLASTIC MATERIALS.

This heading covers textile fabrics which have been impregnated, coated, covered or laminated with preparations based on cellulose derivatives (e.g., cellulose nitrate or cellulose acetate) or other artificial plastic materials (e.g., polyvinyl chloride).

Such products are classified here whatever their weight per m2 and whatever the nature of the artificial plastic component (compact, foam, sponge or expanded), provided:

(1) That, in the case of impregnated, coated or covered fabrics, the impregnation, coating or covering can be seen with the naked eye otherwise than by a resulting change in color.

Textile fabrics in which the impregnation, coating or covering cannot be seen with the naked eye or can be seen only by reason of a resulting change in color are excluded: these usually fall within chs. 50 to 58 or in ch. 60. Examples of fabrics excluded on these grounds are those impregnated with substances designed solely to render them creaseproof, mothproof, unshrinkable or waterproof (e.g., waterproof gabardines and poplins).

note. *Cf. United States* v. *F. W. Myers & Co., Inc.*, 45 CCPA 48, C.A.D. 671 (1958) (possibility of fraud does not justify judicially rewriting a statute).

The government's arguments being unpersuasive, Judge Ford's judgment is *affirmed*.

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U.S. Customs Service

Court of Customs and Patent Appeals

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